SALIM DAWING

v.

LIM KAT KANG

HIGH COURT MALAYA, JOHOR BAHRU
MAHADEV SHANKAR J
[CIVIL SUIT NO. 311 OF 1981]
13 DECEMBER 1984

DAMAGES: *General damages - No loss of present or future earnings - Whether damages payable for diminution of earning capacity or loss of promotional prospects.*

The plaintiff was riding his motor scooter when he was run down by the defendant. Liability was admitted at the trial of the action brought by the plaintiff and general damages on all heads but one and special damages were agreed on and awarded. The only issue that remained to be determined was whether any damages should be awarded to a plaintiff who had not suffered any actual loss of present or future earnings but who was nevertheless claiming damages on the basis of a diminution of his earning capacity in the open market or a loss of promotional prospects in his present environment by reason of the residual disabilities which he had sustained. The plaintiff was attached as a clerk to a school at the time of the accident. He continued in the same job after the accident, suffering no loss of pay despite the physical handicaps brought about by the accident. He was 29 years old at the date of the trial.

Held:

[1] The alleged impaired promotional prospects should be lumped together with the loss of future earnings. They need not be quantified under a separate head, of a loss of earning capacity.

[2] The risks of the plaintiff losing his present job or his being unable to get another job were only slight and a low award was right. Further, as a government servant, the plaintiff was assured security of tenure. (*Othman bin Ahmad v. Singapore Traction Co. Ltd.* [1966] 1 MLJ 64 and *Moeliker v. A. Reyrolle & Co, Ltd.* [1977] 1 All ER 9).

[Judgment with costs to plaintiff.]

Cases referred to:
Jefford v. Gee [1970] 2 Q 130; [1970] 1 All ER 1202
Othman bin Ahmad v. Singapore Traction Co. Ltd. [1966] 1 MLJ 64
Moeliker v. A. Reyrolle & Co. Ltd. [1977] 1 All ER 9

Other source referred to:
Litigation, C.H. Bennett, (November-December 1982), Vol. 2, p. 109

For the plaintiff - N. Jegatheeson; *M/s. John Ang & Jega*
For the defendant - S.P. Veloo; M/s. V.P. Nathan & Partners

JUDGMENT

Mahadev Shankar J:

The only issue which remains to be decided in this case is an important one. It concerns the principles which this Court should apply when deciding whether any damages should be awarded to a plaintiff who has not suffered any actual loss of present or future earnings but

nevertheless claims that there has been a diminution of his earning capacity on the open market or a loss of promotional prospects in his existing environment by reason of the residual disabilities which he has sustained.

Salim bin Dawing was 29 years old at the date of the trial of this action. He started as a clerk in the Education Department Johore on 1 June 1975. On 19 October 1979 he was attached to the Sekolah Kebangsaan Pasak Kota Tinggi. That was the day he met with an accident. He was riding his motor scooter and was run down by the defendant.

Liability was admitted at the trial. General damages on all heads but one (i.e., loss of earning capacity or promotional prospects) was agreed at RM26,000. Specials were agreed at RM1,585. There must be judgment for the plaintiff for these sums.

What additional sum, if any, should be awarded for the contested issue is what we are now concerned with in this case. In the past damages for loss of earning capacity was usually included in the global sum for pain and suffering and loss of amenity. But since *Jefford v. Gee* [1970] 2 QB 130; [1970] 1 All ER 1202 parties are entitled to require that damages under this head be separately quantified.

But the difficulty arises because after the accident the plaintiff continued in the same job. He suffered no loss of pay despite the physical handicaps brought about by the accident.

It is not necessary to set these out in any great detail. Suffice it to say that his more serious injuries were a fracture of the lower 1/3 of the right femur, the right tibia and fibula, and the right 2nd and 3rd metatarsal bones. He saw the Orthopedic Surgeon Mr. V. Kandasamy Pillay on 17 October 1980.

He stated it as his opinion that:

> There is no doubt that this patient has sustained severe injuries to the right lower limb that has left him with a permanent shortening of 3 cm, a stiffness of the right knee, a stiffness of the right ankle and subtalar joints with an equinus or plantar-flexion deformity at the ankle and deformity in the second and third toes. There will be no further recovery from this. If anything, he could develop osteoarthritic changes in the right knee and may need to have the knee fused or arthrodesed (that is completely stiffened) to stop the pain that could come on in the event of osteoarthritic changes arising in this knee. His activities have to be curtailed and he will not be able to take part in any games. He will have difficulty in negotiating steps, walking on slopes and uneven ground and he will not be able to squat.

The plaintiff gave practical examples of how these disabilities had adversely affected his work as a clerk. He says he can no longer drive to the bank to deposit school funds, cannot supervise the school gardener, cannot attend meetings or go unaccompanied to Johore Bahru once a year to buy accounts books.

Socially he claims he cannot attend kenduris and religious functions, and cannot participate in sports.

He thinks his disabilities have affected his promotion prospects. But at the time of his accident his salary was RM420. At the time of trial it was RM595. It is the usual practice for clerks with 8 years' service to be invited to apply for promotion. Such an invitation materialised and the plaintiff applied in March 1983 for promotion. At the date of the trial he had not yet been called for an interview. There is absolutely no evidence to suggest that this was in any way due to the accident. A senior clerk's post to which clerks may be promoted attract a salary of RM1,040 per month as opposed to RM925 which is the maximum on time scale for a clerk.

The plaintiff called as his only witness the Principal of his school from 1 January 1980 up to 16 August 1983. Although he felt the plaintiff's work was below par, and that his injuries had affected his attitude to his work, he nevertheless recommended the plaintiff for a promotion. As a Government servant he says the plaintiff can be transferred to another Department where his duties need not entail the same kind of work involved in the school.

Looking at the plaintiff give evidence and demonstrate his disabilities I could not help feeling that he was a man who was making the most of his troubles and that a more positive attitude to overcoming them would have benefited him considerably.

There is not doubt that he has sustained severe injuries but a claim for loss of future earnings is an altogether different head of damages from a plaintiff's loss of earning capacity.

This distinction was not considered in *Othman bin Ahmad v. Singapore Traction Co. Ltd.* [1966] 1 MLJ 64. The Court at first instance gave RM5,000 for loss of future earnings where an old employee had been kept on in employment doing light duties. His chance for promotion was said to be fair. On appeal, Chua J considered the plaintiff's existing osteoarthiritis a very important factor. The plaintiff was 28 and the strong possibility that disease might become so crippling with the passage of time as to prevent him form working at all, contributed to an enhancement of the award under this head to RM10,000.

The distinction was highlighted in *Moeliker v. A. Reyrolle & Co. Ltd.* [1977] 1 All ER 9. I have found the analysis by Browne LJ of the principles to be applied of invaluable assistance to me, especially the passages commencing at pp. 15 to 18.

The important point to bear in mind seems to me to be that this head of damage is concerned with a plaintiff's loss of earning capacity where as a result of his injury his CHANCES in the future of getting in the labour market work (or work as well paid as before the accident) have been diminished by his injury. What is being compensated is the risk that the plaintiff may lose his employment in future and be at a disadvantage in getting alternative employment because of his injury.

The judgment of Stephenson LJ makes something else clear. The Court was not dealing with a loss or impairment of promotional prospects. It was concerned with the risk of losing the job altogether. The Judge has then to consider first this risk, and secondly if the job is lost, the plaintiff's chances of getting another job. If the risks are negligible no award should be made. If they are real but not serious then a modest award is called for. If it is serious then a substantial award going into thousands of pounds is in order.

In "Claims for loss of earnings in personal injury actions" by C.H. Bennett - **"***Litigation***"** (November-December 1982) Vol. 2 at p. 109 the learned author talks of impaired promotion prospects being compensated for by means of a lump sum payment or if the promotion can be shown to be a probability by an increase in the multiplicand. This seems to suggest that the head of damage being considered here is loss of future earnings, and not a loss of earning capacity.

But the disabilities are there and, on the evidence before me, I hold that the risks of the plaintiff losing his present job or of his being unable to get another job (to use the words of Browne LJ at p. 18) are only slight and a low award is right.

In the circumstances of this case where the plaintiff is a government servant with ample security of tenure I do think it is in order to lump this alleged impaired promotional prospects into the same exercise. No one has come forward to say that his disabilities will be held against him in a promotion exercise. It may even be an advantage if he displayed the right attitude to his work.

a In my view a sum of RM3,000 is proper for this head. Accordingly I adjudge that the plaintiff do recover RM29,000 by way of general damages and RM1,585 as special damages with the usual interest thereon. The plaintiff will also have his costs of this action.

Also found at [1985] 2 CLJ 162

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